



Human Rights Impact Assessments for Trade and Investment Agreements

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1 Introduction

There has been widespread criticism of, and mobilization against, trade agreements and investment treaties, particularly given governments' orientation to focus exclusively on commercial interests in negotiations without taking into account their obligations to address human rights, the environment and development. A wide range of case studies indicate that pressures from international trade and investment rules to open borders for goods and services, to create a "business-friendly" environment for foreign direct investment and to strengthen intellectual property rights have often contributed to undermining the protection and realization of human rights.

The triple global crises of high and volatile food prices, climate change and financial turmoil have heightened public scrutiny of the international economic order. As a result, there is a growing interest and commitment by civil society and by some governments to assess the social and human rights implications of trade and investment policies and agreements – both multilateral and bilateral – including through the use of human rights impact assessments (HRIAs).

In June 2010, an expert seminar was held in Geneva to concretely advance methodologies for, and thinking about, HRIAs for trade and investment agreements. The objectives were:

1. To review lessons learned from existing approaches to HRIAs for trade and investment agreements, as well as other relevant assessment and monitoring tools.
2. To review and develop key principles, indicators and methodological approaches to guide HRIAs of trade and investment agreements, including a focus on specific human rights and on specific trade and investment provisions.
3. To lay the groundwork for the elaboration of guidelines and/or terms of reference for HRIAs of trade and investment agreements, to be applied in pilot initiatives.
4. To strengthen collaboration and international working relationships among civil society organizations (CSOs), academics and UN officials with an interest in promoting HRIAs.
5. To improve recognition of HRIAs as a feasible and important policy step for states negotiating trade and investment agreements.

The seminar was an international collaboration among CSOs, UN experts and academics that have been working on human rights, trade and investment. It was convened under the auspices of Olivier De Schutter, UN Special Rapporteur on the Right to Food. Close to 40 experts from developed and developing countries took part in the two-day seminar at the premises of the South Centre.

Key elements of the presentations and discussions are documented in this report. The meeting underscored the urgency of mobilizing governments, CSOs and multilateral institutions to take concrete steps towards developing a human-rights-based approach to trade and investment agreements, and highlighted the possibilities for employing HRIAs as one means to this end.

Statement from Olivier De Schutter UN Special Rapporteur on the Right to Food

For over ten years, the human rights treaty bodies and independent experts have called on governments to assess the impact of trade and investment agreements on the enjoyment of human rights, but without success. And yet, there is growing evidence that trade and investment policies can have important impacts on human rights, particularly economic and social rights. It is time to act. The methodology for conducting HRIAs exists. The decision to implement HRIAs is a matter of political will. It is time to shift the burden of proof onto the shoulders of those who can make HRIAs a reality, while at the same time ensuring that expert information on methodologies is available.

HRIAs are a useful tool for developed and developing country governments for a number of reasons. HRIAs can:

1. Help governments ensure compliance with international obligations. States have multiple obligations under international law, based on treaties they have signed and ratified. These cover issues such as human rights, development, environment, women's rights, trade rules, foreign investment and intellectual property. HRIAs can help governments determine whether new or existing trade and investment agreements will undermine their human rights obligations. Indeed, ensuring consistency between human rights obligations and trade and investment agreements is essential at the stage of negotiation of such agreements. Otherwise, because of the stronger enforcement mechanisms in trade and investment regimes, human rights obligations risk being set aside when conflicts arise.
2. Strengthen democratic control and accountability for the effects of trade and investment agreements. HRIAs include consultations with stakeholders who might be affected by new agreements on trade and investment. The process allows national parliaments, civil society and national human rights institutions to have a voice in assessing trade and investment policies, thereby strengthening democracy and making decisions more accountable to citizens.
3. Empower governments from developing countries to improve their bargaining power while negotiating trade and investment agreements. Historically, the introduction of human rights considerations into trade negotiations has not been popular among developing countries. There have been concerns that human rights would be used by developed countries to impose conditionalities, or to delay granting market access to goods originating from developing countries. Nevertheless, the situation is shifting, and developing countries are starting to see the benefits of human rights in helping them to defend their development needs. It is essential to engage developing country governments to be active and involved in shaping the framework for conducting HRIAs.

2 Key Messages of the Seminar

The seminar underscored a series of messages to governments, intergovernmental organizations, civil society and the public:

- The global trade and investment regime has a profound impact on human rights. An alternative regime is needed to ensure that trade and investment support the realization of human rights. HRIAs can contribute to this goal.
- The lack of transparency and accountability in the negotiation of trade and investment agreements, including the lack of access to the texts of agreements, undermines the right to information and participation, and is a major obstacle for HRIAs. HRIAs can also be a remedy for some of these concerns.
- Human rights provide a normative framework for the assessment of trade and investment agreements. A human rights framework must be employed to address economic “trade-offs”, highlighting issues of inequality as well as key human rights principles such as progressive realization and non-retrogression. At the same time, methodologies to assess impacts must be technically sound.
- There is an important link between HRIAs and a state’s human rights obligations. There is a due diligence obligation on states to provide access to information about trade and investment negotiations and to assess the human rights implications of economic policies. The obligation is to states’ own populations and to populations beyond their borders.
- HRIAs can help to ensure that trade or investment agreements do not restrict states’ policy space in a way that prevents them from addressing development strategies and human rights obligations. HRIAs of trade and investment agreements must be prepared *ex ante*¹ in order to have an impact on government positions and policies. *Ex post*² HRIAs also can be useful, particularly to guide the implementation of schedules of commitments, or in combination with “sunset clauses” in agreements.
- Trade and investment agreements must include safeguard clauses and flexibilities in order to preserve the possibility for states to comply with human rights obligations as they evolve.
- HRIAs should not have a one-size-fits-all approach. They should be flexible and adapted to different national contexts and to address priority issues, although the shape and form of an HRIA is not infinitely flexible.
- International benchmarks for what constitutes a credible HRIA process must be established. These include: independence; fair and transparent process; involvement of relevant expertise; participation by a wide range of stakeholders; empirical research that tracks both positive and negative impacts linked to indicators (quantitative and qualitative); attention to the process dimension of the trade/investment negotiations; adequate financing; and a channel to feed recommendations into official processes.

¹ An assessment before the agreement is signed.

² An assessment after the agreement is signed.

- There are risks in embarking on an HRIA process, including that the process may be used to conclude harmful agreements with ineffective safeguards or compensation provisions. This has implications for the participation in HRIAs of CSOs and social movements that are also pursuing broad political and social goals to resist agreements.
- There are many different strategies to pursue “human-rights-friendly” trade and investment regimes, including through mobilization, campaigning, advocacy, research and policy analysis. HRIAs are one tool for advancing this broader agenda. HRIAs can also be used as a mobilization tool to generate greater accountability for human rights. It is important to assess when HRIAs are a useful tool to employ.
- It is time to start undertaking HRIAs, and to learn from this experience.

3 Different Perspectives on HRIAs

The initial panel of the seminar set the stage for a discussion of key strategic issues associated with HRIAs. What emerged from this discussion is that there are various perspectives on HRIAs that need to be considered in developing a way forward. These include the perspectives of trade negotiators, developing country governments and diverse civil society organizations, including advocates for gender equality and HRIA practitioners.

3.1 Trade negotiator perspective

The discussion highlighted that while trade and human rights are not the greatest friends, they are no longer enemies. Pascal Lamy, Director-General of the World Trade Organization (WTO), was the first leader in the trade community to publicly state the importance of human rights. Nevertheless, human rights are generally a source of conflict between WTO member states, so participants were reminded that it is important to be realistic about what is feasible in the context of the WTO. If governments reject HRIAs, they will not be implemented. This was the experience of other issues, for example the impact of trade on labour rights.

The WTO Secretariat supports the idea of impact assessments to help improve understanding of what trade liberalization means, but this is a political issue. It was noted that in general, it is developing countries that are opposed to bringing other issues into the WTO, including human rights, labour and the environment. From a trade negotiator’s perspective, it is important to move away from a purely ideological debate about impact assessments and to be pragmatic. If the issue becomes ideological, governments may walk away. Furthermore, it is essential that the HRIA tool be easy to use. If people do not understand how to implement HRIAs, they will most likely fail.

HRIAs are valuable as a means to avoid human rights violations. It is important to find out in advance whether an agreement will violate human rights, in order to prevent it from doing so.

3.2 Developing country perspective

It is important to consider three interlinked but complex issues from the perspective of developing countries.

1. *Which human rights?* Developed and developing countries have had distinct approaches to, and concerns about, human rights in the context of the WTO. It was noted that, roughly speaking, developed countries focus on civil and political rights and developing countries focus on economic, social and cultural rights and the right to development. Developing countries have invoked economic, social and cultural rights in the WTO, the World Intellectual Property Organization and the UN Human Rights Council. The Group of 33, a group of developing countries that defend food security and rural livelihoods, has frequently invoked the right to development in its statements and proposals. Brazil refers to the right to health in relation to proposed TRIPS reforms. Bolivia requested that the Special Rapporteur on the right to health visit the WTO. Developing countries are showing increasing interest in using tools that highlight costs to economic, social and cultural rights, as a means to bolster their negotiating positions.
2. *Which model of development?* There are many debates about how to achieve development. Is it through economic growth alone? What is the role of the state? There is also increasing interest in the concept of a “developmental state” to help realize human rights. What is a rights-based approach to development? What are the roles of the public and private sectors? These are complex questions and governments adopt different policies, which must be respected.
3. *What is meant by trade?* Trade and trade agreements are two separate things. Depending on how trade is conducted, it can help or harm development and the realization of human rights. When considering the ways in which trade agreements shape how trade is conducted, it is important to keep this in mind.

3.3 Gender perspective

The point was made that HRIAs must include a specific focus on the impact of trade and investment agreements on gender equality, but beyond this, a gender-informed human rights assessment is needed. The 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) was a milestone. Since then, the outcomes of several key events, including the Vienna, Cairo and Beijing Programmes of Action, have helped to create the corpus of law for human rights that takes gender into account. This body of law should be incorporated in the design and implementation of HRIAs.

Methodologies for HRIAs must provide data disaggregated by sex and then further disaggregated by race, religion, labour status etc. Women’s voices must be reflected in the assessments. Women’s groups must be consulted, and they should be a key source of information for the assessment process.

It was noted that HRIAs are a good step, but they are not enough. It is crucial that there be a more consistent integration of gender throughout the human rights agenda, particularly at the Human Rights Council.

3.4 Other perspectives

Various points were raised about the ways in which HRIAs, and the concepts underlying them, are perceived. Impact assessments are a form of evaluating the effects of different policies and programs. There is less than a decade of practice in HRIAs, and they have mainly been undertaken by CSOs. HRIAs do not have the formalized or professionalized identity of environmental impact assessments (EIAs). There is no single professionalized methodology for HRIAs, although there is an increasing amount of practice.

Furthermore, a number of similar concepts exist in trade, investment and human rights agreements, but they differ in their interpretations. For example, in the human rights realm, “non-discrimination” means that when there are unequals, positive discrimination in favour of the weak is needed to achieve equality. A human rights approach is interested in the outcome. Thus non-discrimination in the human rights regime includes affirmative action. Non-discrimination in the trade regime, however, means that a foreign company must be treated the same as a local company, no matter how economically powerful or weak the companies are. The assumption is that liberalization is good in and of itself, and that everyone should be treated the same throughout the process. The WTO has tried to offset the principle through “Special and Differential Treatment” provisions and the concept of non-reciprocity, but these exceptions are minor in comparison to the general principle.

4 Challenges to Conducting HRIAs

Throughout the seminar, a number of challenges for HRIAs were raised.

There was considerable discussion of the challenges of *ex ante* assessments. Is it truly possible to do an *ex ante* assessment of a trade or investment agreement? HRIAs require a significant investment of resources, consultation of different stakeholders and time. The negotiating texts of a trade agreement can vary significantly from the start until the agreement is concluded.

Another difficulty in assessing the impact of trade and investment agreements is that it is not always the agreements themselves, but rather the domestic policies put in place by governments, which create the winners and losers. This underscores the importance for HRIAs to identify dangers *ex ante*, in order to allow governments to take precautions, including safeguard clauses.

Most participants felt that it was possible, and necessary, to conduct *ex ante* assessments even if they were not perfect. Under the WTO’s Doha Agenda, for example, the World Bank, universities and NGOs carried out assessments of the *likely* outcome of the negotiations. These were not precise but helped to highlight possible impacts and alert government negotiators.

Ex ante assessments of investment agreements pose their own unique challenges, because it is difficult to model the potential economic consequences of an investment agreement. Economists have been trying to show that investment liberalization promotes investment, but there is no convincing evidence to support the theory. How can the HRIA explore the implications

of the loss of policy space resulting from the legal obligations of the treaty and its enforcement provisions?

Investment experts and practitioners agreed that, when analyzing the actual or potential conflicts between international investment agreements and human rights treaties, it is important to look at both the *de facto*³ and *de jure*⁴ conflicts and to examine current and past experiences of such agreements, for which there is a wealth of information. This would make the exercise easier and provide empirical evidence of a range of potential impacts.

There was discussion of whether HRIAs are a technical or a political process. Some participants noted that the human rights framework does not have an ideological view of free trade, and that HRIAs must evaluate both positive and negative impacts. They argued that while everyone has a political point of view, the challenge is to create a methodology that is robust enough to transcend ideological boundaries. Other participants underscored that human rights have normative content. These participants said that the purpose of HRIAs is to allow people to engage in a political discussion of priorities and outcomes. In this view, impact assessments are not an apolitical exercise, and it is important not to shy away from this fact.

There is a real challenge in how HRIAs can be viewed by developing country governments. On the one hand, they can be used to improve developing countries' bargaining power in negotiations. On the other hand, they are a means to hold developing countries accountable for their actions and to improve democratic control of decision-making on trade and investment policies. This duality must be acknowledged and addressed. Developed country governments also will have mixed views on the utility of HRIAs, depending on their approach to human rights and their willingness to open trade policy choices to greater scrutiny and debate.

Most participants stressed that HRIAs must be a tool to assess the coherence of trade and investment agreements with both the domestic and extra-territorial obligations (ETOs) of states. The ETO component is a critical part of the legal obligation, and important given the frequent power differentials among negotiating partners from North and South. To focus only on domestic obligations would be unfair, and would cause developing country governments to resist HRIAs. Some participants, on the other hand, cautioned that it was dangerous to invoke ETOs because the concept is a recent one and its recognition is not unanimous.

Another issue raised was how states that are committed to the realization of economic, social and cultural rights can pursue the protection of those rights in the context of current market-based solutions to poverty and economic development. This dilemma implies that the central issue for HRIAs to address is one of policy space. Any new international agreement necessarily leads to a loss of policy space, and the corresponding danger that governments will not be able to introduce regulations that protect or fulfill human rights. Questions were raised about how to quantify the loss of policy space and how HRIAs can help to measure the impacts of that loss. For example, how do trade agreements reduce tax revenues from tariffs or increase the price of essential medicines due to intellectual property measures, and what are the human rights implications? This was a key concern for all participants.

³ What happens in practice.

⁴ What is written in law.

Another point made was that there is a danger that HRIAs will be used to justify concluding trade and investment agreements rather than challenging the existing model of trade and investment, which advocates liberalization and deregulation. Even though HRIAs may be a useful tool, at what point can developing countries just say “no,” they do not want to negotiate an agreement? In Africa, for example, CSOs fully expect, based on previous experiences of liberalized trade, that the Economic Partnership Agreements with the European Union (EU) will adversely affect human rights. In this case, HRIAs may undermine resistance to the current model of trade and investment agreements, by providing options for countries to conclude agreements with limited safeguard provisions.

Discussion emphasized that there is a real problem integrating gender into the agendas of all three regimes: human rights, trade and investment. Current practice of HRIAs does not adequately capture how gender inequalities are exacerbated through trade and investment liberalization. HRIAs must build in a specific focus on the impact on gender. Methodologies must include sex-disaggregated data.

There was discussion of how environmental impact assessments are effective and feasible because they cover a relatively narrow area. There is a danger of being overly broad when it comes to HRIAs. Yet, the more selective the focus on human rights, the easier it is to look at only a part of the picture. The challenge is how to cover enough terrain while maintaining a relatively narrow scope of issues.

Participants emphasized the need to include all human rights. It was noted that there is a tendency to focus too much on economic and social rights, but civil and political rights are equally important – including issues of participation and access to information as well as scope for debate and dissent on trade policy options.

5 Lessons Learned from Conducting Impact Assessments

An overview of main lessons from previous impact assessments highlighted achievements, shortcomings, challenges and political lessons.

5.1 HRIAs and trade agreements

There have been three main experiences of undertaking HRIAs of trade agreements:

1. Thai National Human Rights Commission *ex ante* assessment of the Thai-US bilateral free trade agreement (FTA);
2. An *ex post* assessment of the impact of trade liberalization on the right to food in developing countries, carried out by FoodFirst Information and Action Network (FIAN) in collaboration with a number of other CSOs; and

3. An assessment of the impact of the Central American Free Trade Agreement (CAFTA) on the right to health of people in Costa Rica.

There have not been any government-led HRIAs. However, governments have undertaken Social Impact Assessments, which may have similar methodologies to HRIAs but which do not use human rights norms as the guiding framework. These include the United Nations Environment Programme (UNEP) integrated assessments, the EU Sustainability Impact Assessments, and a number of *ad hoc* impact assessments undertaken in South America and the South Pacific.

Furthermore, there has been a recent agreement as part of the Canada-Colombia FTA that each government will undertake an annual report on human rights impacts of the trade deal. However, there are no clear processes or standards associated with the agreement, leading to the danger that there will be a superficial process that pays only lip service to human rights.

5.2 Key lessons from HRIAs and social impact assessments

1. *HRIAs have an added value over other social impact assessments.* While social impact assessments are often partial and arbitrary, HRIAs have a strong normative framework that is based on international treaties and conventions, which have codified states' human rights obligations. This framework puts pressure on duty-bearers, engages international and national human rights institutions and emphasizes the importance of transparency, participation and empowerment. It shifts the perspective from the aggregate to addressing the disaggregated needs of the poorest and most vulnerable.
2. *HRIAs require flexibility and adaptability.* Different approaches are required for different provisions of a trade or investment agreement. Methodological issues will vary depending on the provision. There is no single blueprint for all provisions.
3. *HRIAs need to be robust and user-friendly.* HRIAs are complex and time-consuming, but if the methodology is too complex it will alienate governments and other actors. HRIAs should ideally form part of a cyclical process that provides ongoing input to inform policy decisions. Other types of assessments and feasibility studies could assist the HRIA process.
4. *HRIAs should include relevant experts and maintain independence.* It is important to include experts from various disciplines – including trade, investment, law and social sciences – in the HRIA process. If the government takes the lead in the HRIA, there is a need to ensure independence and impartiality in the process.

For further information please see the background paper prepared by James Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*, in [Annex 2](#).

5.3 Key lessons from environmental impact assessment (EIA) processes⁵

EIAs have a relatively long history. The 1954 assessment of the Equatorial Nile Project was the first example of an EIA. In 1969, a formal framework was established. In 1972, the Stockholm Conference created UNEP, which strongly advocated and implemented EIAs. By the time of the 1992 Rio Conference, countries were putting EIAs in place to avoid being publicly shamed. It is also important to note that EIAs have focused on the impacts of concrete projects rather than addressing the more complex issue of the potential impacts of an agreement or treaty.

Some key lessons from EIAs include the following.

1. *EIAs enable democratic processes.* They create channels for dialogue with affected stakeholders and produce valuable information for communities, companies and the general public. EIAs have also created the possibility for judicial review, further strengthening the democratic process. However, it is important to note that, in practice, public participation has been less than optimal.
2. *EIAs provide a framework for international cooperation in the event of transboundary conflicts.*
3. *EIAs are an essential tool for integrating finance, development and the environment.* EIAs have had the effect of empowering other actors. In the past, a country's Ministry of Finance would make decisions with the World Bank. EIAs have changed this practice. Stakeholders and environment ministries are now involved. This creates a much more integrated approach to development that incorporates a range of different perspectives and voices.
4. *Baseline data are crucial for conducting EIAs.* In general, there are insufficient baseline data for EIAs. Without reliable and accurate data it is impossible to know how the environment will change, and this limits the findings of an EIA.
5. *Mitigating environmental harm has proved difficult.* In practice, mitigation measures are generally ineffective, and there is an over-reliance on setting up the correct EIA process rather than addressing the actual outcomes of investment projects.

5.4 Other impact assessments

In India, CSOs have developed a Housing Eviction Assessment Tool. The tool is being developed based on field experience, which has helped to simplify it to make it more relevant to communities.

The International Trade Union Confederation examined the impact of the WTO industrial goods negotiations on employment. The impact assessments were used by developing country trade unions to pressure their governments to change positions. The lobby efforts worked and,

⁵ See the related paper prepared for the seminar: Orellana Cruz, Marcos (June 2010). EIAs in Practice: Potential Lessons for Human Rights Impact Assessment: CIEL. http://ciel.org/Publications/EIA_Brief_Jun10.pdf

as a result, developing country governments formed an alliance to defend industrial development and employment at the WTO.

6 Indicators and HRIAs: Some key issues

The use of human rights indicators⁶ is an important consideration in HRIAs, given the focus in HRIA methodology on empirical evidence to assess impacts.

For HRIAs of trade agreements, it is necessary to choose appropriate human rights indicators that can demonstrate changes between the baseline and future enjoyment of a right after the introduction of a new trade measure. This requires establishing a limited number of valid and reliable indicators that can focus data collection and analysis while effectively demonstrating impact. Criteria for selecting human rights indicators are proposed in the literature.⁷

The Office of the High Commissioner for Human Rights (OHCHR) has taken the lead in pioneering efforts to develop indicators to measure the realization of human rights. It has translated human rights into quantitative indicators (and qualitative indicators that include quantitative components) to help assess the impact of government policies. The OHCHR identified four attributes for each human right (availability, accessibility, affordability and quality) and placed them into three categories of indicators (structure, process and outcome).⁸

The seminar provided space to deepen the discussion of the use of indicators in relation to some specific human rights concerns.⁹ A number of questions and issues were raised, including the following.

1. *Are indicators sufficiently developed?* Some participants felt that sufficient work has been done on indicators to enable their use in assessing impacts. Others felt that major gaps remain in the current approach to indicators, rendering them inadequate.
2. *Should the list of indicators be broad or narrow?* Some participants felt that indicators should be broad in order to cover the obligations contained in all human rights treaties.

⁶ Human rights indicators can be seen as statements of qualitative and quantitative information that describe human rights or aspects of those rights in situations and contexts and measure changes in the enjoyment of those rights over time.

⁷ See Walker, Simon (2009). *The Future of Human Rights Impact Assessments of Trade Agreements*. Intersentia: Mortsel, Belgium.

⁸ This was informed by a chart that was elaborated by Brot fur Die Welt and the Heinrich Boll Foundation and then simplified by the Centre on Housing Rights and Evictions. The indicators include questions such as: How many children have diarrhea? How many people lack access to drinking water? Do laws discriminate against and exclude certain groups? Was the process for policy-making transparent? Were communities involved in decision-making? Were women involved? Is there adequate legislation on the right to water? Are there proper institutions? Are human rights justiciable?

⁹ Detailed but informal reports from workshops on indicators for the rights to food, water and health and for labour rights are available from the seminar organizers.

They argued that using the “respect, protect, fulfill” framework of state obligations covers both potential violations of human rights and steps needed for progressive realization. Once the broad list is in place, practitioners can narrow the list depending on the nature of the HRIA. Other participants felt that this approach was too onerous and burdensome to be practical for governments. These participants were in favour of selecting a short list of indicators, 12 or 15, to keep the task manageable.

In general there was consensus to use past experiences to identify the likely concerns or sectors to be heavily affected by the priority issues in the agreement, and work from these to create a list of potential human rights impacts and their corollary indicators. For example, when examining the impact of agricultural trade agreements on the right to food, the key issues may include: the impact of import surges, the impact of export subsidies on poor farmers in third countries, the loss of livelihoods when cheaper food is available on the market, declining consumer prices without a subsequent rise in producer prices, changing diets, increased dependence on processed foods, and loss of state revenue from tariffs.

3. *Do human rights indicators differ from development, employment or health indicators?* Yes, the importance of the human rights framework is its focus on vulnerable and marginalized groups, the matrix of state obligations, and the emphasis on the interdependency of rights. A human rights approach is interested in the impacts of policies on different groups. An HRIA emphasizes the disaggregated effect of trade and investment agreements on women, poor people, indigenous groups, migrant workers and people working in the informal economy. Other indicators tend to comprehensively address particular issues but without making reference to rights. Human rights indicators could serve to strengthen other indicators.
4. *How is it possible to combine the work of the OHCHR, World Health Organization (WHO), International Labour Organization and Food and Agriculture Organization on indicators?* Indicators from other specialized UN agencies are useful as templates or to crosscheck. However, these other indicators are not exhaustive and must be adapted when conducting HRIAs.
5. *What of the quality of, and access to, baseline data?* Data are crucial for tracking the appropriate indicators. Yet data collection is cumbersome, and states are discouraged from collecting and storing data out of fear that it will be used against them. There are also significant gaps in the quality of available information. For example, disaggregation by sex and other characteristics is important for human rights research, but disaggregated data are often not available. This challenge must be flagged in any HRIA process.

7 Methodologies for Conducting HRIAs

There are three important elements to an HRIA:¹⁰

1. *Outcome*: What is the impact of a trade agreement on the enjoyment of human rights? This includes how the agreement affects the capacity of people to enjoy their rights, and how it affects the legal and moral obligations of duty-bearers.¹¹
2. *Process*: How does the process of trade negotiations respect human rights principles? In other words, how transparent, consultative and participatory is the process? Are the voices of potentially affected people included? Does the process discriminate against women?
3. *Actors*: It is important to involve human rights actors at the national and international level. A network of human rights actors can strengthen the HRIA methodology.

The key steps to conducting a HRIA include:

1. *Selecting the team*: It is important to involve a diverse range of expertise, including a human rights lawyer, a trade or investment lawyer, an economist and a social scientist (particularly for participatory processes).
2. *Screening the issues*: A narrowing exercise is needed to determine which trade and investment provisions are the priority for the assessment.
3. *Scoping*: Identify in more detail what is to be assessed, as well as indicators, data sources, tools and processes. If the assessment is *ex ante*, identify possible scenarios with as much clarity as possible. Be clear about what is being assessed. This can be a complex process. A hypothesis of impact must be developed. If the assessment is *ex post*, identify the impact at the macro and micro levels. The macro level can include trade measures, domestic regulations and intellectual property provisions. The micro level can be assessed by studying the situation on the ground. This should be a case-by-case, participatory and transparent process.
4. *Conducting the analysis*: Where does the human rights impact occur? It is important to include both a legal analysis and an economic analysis. Economic modeling is important for *ex ante* assessments and can help to produce data that strengthen the legal analysis. There is also a causal chain analysis. It is important to get the causal chain of impact right. Appropriate indicators should be used to measure the impacts on the ground, such as on household income, market concentration and migration. The use of an expert opinion could help to give greater justification to results.
5. *Conclusions and recommendations*: Recommendations may include an emphasis on the role of the duty-bearer to do more. The HRIA may find that the trade or investment

¹⁰ This section draws strongly on the presentation and work of Simon Walker, an independent human rights expert who also works at the OHCHR. See Walker, *op. cit.*, for greater detail.

¹¹ Duty-bearers are usually governments, but other actors also have legal and/or moral obligations with respect to human rights, for example the private sector and international organizations.

agreement is not the problem but rather government policy, or a combination of the two. This finding can then be used for advocacy.

6. *Monitoring and evaluation*: Including a step on monitoring and evaluation provides a means to promote some form of follow-up to the HRIA, including examination of any recommendations that were implemented. The strong emphasis placed on monitoring within human rights treaties highlights the importance of including monitoring and evaluation within an HRIA methodology.

The seminar also grappled with the specific challenges of designing methodologies for HRIAs of different aspects of trade and investment agreements. Please see Annex 1 for some key reflections.

10 Categories of Impact of Trade Agreements on Human Rights

The impact of trade agreements on human rights is the subject of a rich and complex debate. The following categorization, which identifies potentially positive and negative impacts as well as impacts at different levels (legal, policy, process, etc.), may help to structure analysis in an HRIA.

1. *Trade law complements human rights law*: The common philosophical and historical roots of trade and human rights law have been noted. Some literature says that trade agreements can have a positive impact on the enjoyment of human rights. Trade agreements rely on respect for procedural human rights related to the rule of law.
2. *Trade agreements promote the growth and resources necessary for the progressive realization of human rights*: Some evidence suggests a generally positive relationship between trade openness and growth. However, there is no automatic correlation between growth, employment and the progressive realization of human rights.
3. *Trade agreements can breach human rights in practice*: Although an agreement by itself may not breach human rights, in practice it may trigger changes that have a negative impact. Increased competition could threaten livelihoods of those unable to compete in the open market. Prices for essential goods and services may rise, reducing access for those living in poverty. By promoting a market approach to the provision of goods and services, agreements may lead to two-tier provision, exacerbating inequality and discrimination.
4. *Trade agreements can limit government capacity to promote and protect human rights*: Agreements can reduce government financial capacity (e.g. by lowering tariffs), reduce policy space to promote and protect rights, and prevent retraction of liberalization measures that have proven to work against human rights.
5. *Trade agreements are linked to a race to the bottom*: This argument has particularly focused on labour standards. Empirical evidence tends to be inconclusive. This might be more relevant to test in an ex post assessment.

6. *Trade agreements limit the use of human rights protection measures directed abroad:* Most favoured nation treatment may prevent human rights conditionalities. There are some exceptions, but no certainty of outcome for trade measures designed to improve human rights abroad.
7. *Trade law conflicts with human rights law:* Are there normative conflicts between the two bodies of law? To find open conflicts between trade and human rights law is the exception, but it can be useful to do the analysis.
8. *Trade agreements may limit the enforcement of human rights:* This may occur because trade agreements have a chilling effect on human rights or might trump human rights when it comes to enforcement (the WTO Panel and Appellate Body have teeth whereas human rights courts lack enforcement power).
9. *Negotiating process:* Has the process had a negative or positive impact on the right to take part in the conduct of public affairs?
10. *Trade values threaten human rights values:* Trade agreements push a neo-liberal vision of the world, whereas human rights are based on the notion of solidarity and the right to development. There is fear that trade values will trump values of social solidarity. There is room for HRIAs to produce evidence to support other models.

Source: Presentation by Simon Walker, Independent human rights expert.

8 Implementation: What roles for different institutions?

Seminar participants considered the roles of various institutions. A number of institutions are already equipped to either conduct or call for HRIAs. These institutions are important to provide the necessary capacity and expertise to be able to kick-start the HRIA process. They include national human rights commissions, parliaments, UN agencies, human rights mechanisms and civil society organizations.

The UN, for example, can set mandates for ongoing research into the impact of trade and investment agreements on policy space and the implementation of the right to development. In addition, there have been calls for governments to conduct HRIAs, from various bodies in the UN including Special Rapporteurs, the OHCHR, the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property, the Working Group on the Right to Development, and those involved in WHO Health Impact Assessment work and the Millennium Development Goals (MDGs). Success has been limited. The OHCHR, the natural UN home for HRIAs, has not been particularly active on the issue and is extremely over-burdened with other human rights issues.

Human rights treaty body mechanisms can request governments to undertake HRIAs. Unfortunately, though, there is no guarantee that states will accept their mandate. The Committee

on Economic, Social and Cultural Rights, for example, requested that Kenya conduct an HRIA but Kenya has still not complied. In fact, the treaty monitoring bodies have made 30 concluding observations calling for governments to conduct impact assessments of trade, but there is no guidance or minimum standards, and no power of enforcement.

In the case of national parliaments, their position vis-a-vis the executive branch, or in the context of global power relations, is crucial to their capacity to call for or implement HRIAs. For example, the relationship between the U.S. president and Congress gives Congress quite a strong voice in decision-making. On the other hand, in Ghana, even though the parliament took a decision to raise tariffs, the decision was overruled by the government after pressure from the International Monetary Fund. In Canada, the parliament has proved to be an important avenue for amplifying the demands for HRIAs and for strengthening civil society's voice in trade negotiations.

CSOs can play many roles in advocating for HRIAs and in their implementation. They can launch public campaigns to pressure governments to undertake HRIAs that are transparent, independent and inclusive. They can provide the necessary links between local communities and other affected stakeholders to help to provide input to an HRIA process. CSO can invoke UN human rights mechanisms and can also provide their own expertise to help design the appropriate methodology, set of indicators and expert team. Finally, CSOs can play a useful follow-up role, contributing to *ex post* assessments and ongoing monitoring and evaluation of the impacts on the ground.

Case study 1: Canada-Colombia FTA and the role of national parliaments

Parliament has played a major role in promoting debate in Canada about the need for HRIAs of trade agreements, particularly during the Canada-Colombia FTA negotiations of the last three years. Parliamentarians had a significant impact because the government did not have majority control.

Fuelled by citizen and CSO mobilization, an alliance of opposition parties called for an independent *ex ante* HRIA of the Canada-Colombia FTA before ratification of the agreement. CSOs from both Canada and Colombia participated in parliamentary hearings. A parliamentary committee travelled to Colombia and provided important exposure of the issues. However, the parliamentary alliance eventually broke down.

As a response to demands for attention to human rights and for an HRIA, a new add-on treaty was brokered. The result is that the governments of Canada and Colombia will each write an annual human rights report on the effects of the FTA in both countries. This is an important recognition of the mutuality of human rights obligations and allows ongoing debates about human rights in each country's parliament. However, there is no detail on process, standards, objectives or consequences for the HRIA, and there are no extra budgetary resources that can be spent on the report. Many CSOs, parliamentarians, and international commentators have criticized the agreement or underscored its weaknesses.

Source: Presentation by Gauri Sreenivasan, Canadian Council for International Co-operation

Case study 2: Thai-US Free Trade Agreement (FTA) and the role of the National Human Rights Commission

In 2007, an HRIA was financed and conducted by the Thai National Human Rights Commission (NHRC), covering agriculture, environment, intellectual property, services, investment and the negotiating process. The independence and credibility of the NHRC was an important factor in the success of the HRIA. In addition, strong media coverage and an active parliament ensured ongoing public debate about the potential impact of the Thai-US FTA.

The HRIA helped to raise awareness. It opened communications channels between government officials and grassroots organizations. It provided the political space for CSOs to raise concerns about free trade and opened space to talk about alternative models for trade.

The HRIA identified a lack of transparency and public participation. These two findings were arguably the most important, because they helped to democratize the treaty-making procedures. Meaningful public participation and transparency are now enshrined in the new constitution of 2007 for the negotiation of any new treaties. There is improved language on social justice: the winners have to share the burden with the losers. This is a recognition of the impact of liberalization on different sectors. The NHRC can now bring a case of human rights violations before the High Court (where before it could only participate as an observer).

Thailand now plans to negotiate a bilateral trade agreement with the EU. Parliamentarians are already involved, public participation has happened and impact assessments will be conducted. The NHRC is also pushing to have HRIAs for the Association of Southeast Asian Nations (ASEAN).

Source: Presentation by Jacques-chai Chomtongi, Focus on the Global South and FTA Watch, on behalf of the Thailand NHRC.

9 Conclusion: Next Steps

The seminar concluded with a discussion of points of emerging consensus and next steps. Key messages from the seminar were reviewed (see section 2 for a summary). A number of possible next steps were identified. The main ideas for follow-up were as follow.

1. Prepare a document based on the key messages from this seminar to be presented to expert human rights mechanisms (Special Rapporteurs and treaty bodies) to enlist their support and backing.
2. Organize a meeting of developing country governments to show how HRIAs can be a useful tool, and to identify those interested in piloting different HRIA processes. The South Centre offered to organize such a meeting.
3. Start undertaking HRIAs. Interested governments of both developed and developing countries should be sought to agree to a process. CSOs should also mount their own processes. There is interest burgeoning already for assessments of EU and Canadian FTAs. Studies should not just focus on impacts in developing countries.

Additional suggestions included:

4. Prepare papers to explain the differences between key principles of human rights, trade and investment, especially when they use the same terminology, such as non-discrimination.
5. Compile, into a book, a series of papers linking trade and investment to human rights.
6. Document past experiences where compensation or safeguards were implemented, which could serve as lessons for HRIAs.
7. Document where past impact assessments had an effect on trade and investment treaties. If they have not, explain why this is the case.
8. Conduct further methodological reflections on HRIAs for services as well as for industrial goods.

Annexes

Annex 1: Summary of Workshop Reflections on HRIA Methodologies for Different Trade Agreement Provisions

The seminar participants divided up into four groups to consider a series of questions on how to design appropriate methodologies for different aspects of trade and investment agreements and negotiating processes.

Is there a methodology for the trade negotiating process that could be seen to meet HRIA standards? If so, what are the standards and indicators for measuring a 'good' negotiating process?

One group looked at a range of possible methodologies for the period of trade negotiations. There was consensus on the need for participation, access to information, accountability and transparency, whenever governments enter into trade and investment negotiations.

The negotiations for the Cotonou Agreement between the EU and the African, Caribbean and Pacific (ACP) countries, for example, allow CSOs to participate in trade negotiations, and entitle them to funding and capacity building. However, in some cases, for example in Kenya, CSOs were excluded from the negotiating process.

The group found that a more comprehensive methodology came from a report by the Working Group on the Right to Development, which outlines participatory human rights processes. This includes: (1) drawing on human rights instruments to elaborate development strategies; and (2) ensuring non-discrimination, access to information, participation and effective remedies.

Finally, the group examined the experience of Thai CSOs which have outlined an additional methodology based on recent changes to the constitution. They argue in favour of a series of provisional steps before the government is even allowed to enter into trade negotiations. This includes: (1) check the level of involvement of parliaments in the treaty making process; (2) conduct impact assessments of possible negotiating texts of trade agreements; and (3) seek approval from the public domain and parliament.

What methodology to employ for conducting HRIA of international investment agreements?

The second group explored different methodologies for conducting *human rights* impact assessments on investment agreements. When analyzing the actual or potential conflicts between international investment agreements and human rights treaties, they found that it was important to look at the *de facto* as well as the *de jure* conflicts. It would also be critical to draw an assessment of likely impacts in an *ex ante* context from existing practice or past experiences of countries with bilateral investment treaties, which would provide a range of potential impacts from an empirical base. For example the group heard a presentation of South

Africa's experience where important human rights policies such as affirmative action measures defined in the new Constitution have been challenged using investment treaties.

For countries that find themselves in conflict situations, the group said it was important to look at the intersection of human rights, humanitarian and international investment law. This would shed light on the implications of providing investors with protections and rights while people are being violently displaced from their land.

Finally, the groups said it was important to map out fundamental conflicts in the system that give rise to negative human rights outcomes. For example the construct of investor-state arbitration, including its non transparent nature, the incentives for investment lawyers and arbitrators to favour corporate interests, and the side stepping of democratic national process.

What are the methodological steps for carrying out ex post HRIAs on agricultural trade and the right to food?

The third group identified five methodological steps for carrying out ex post HRIAs. They looked at the example of the impact of agricultural trade on the right to food. The steps include:

1. Identify the provisions in trade and investment agreements that might have an impact on the enjoyment of the right to food and other human rights in the area of agricultural trade. These might involve the reduction of bound and/ or applied tariffs, service liberalisation in favour of the expansion of supermarkets or investment liberalisation for example for investment in land or other natural resources.
2. Assess the possible impact of these changes in trade policies at a macro level on production, the acreage of cultivated land, the number of people working in agriculture etc. This macro-level assessment should draw from empirical experience with past liberalisation in the same country or in countries with a similar structure. And it should also include economic modelling.
3. Study the impact on the ground. The group argued in favour of a case-by-case approach, which would be participatory and transparent. Appropriate indicators could help to measure the impact on the ground at the community level, including on household income and expenses, food security, health and migration.
4. Conduct a normative assessment on whether the right to food has been violated in the short and long term.
5. In case the right to food has been impaired or violated, the HRIA should make recommendations for how to remedy the situation.

What are the methodological steps for carrying out HRIAs on the impact of intellectual property rights?

The fourth group looked at intellectual property rights. This is the area where most of the work on HRIA methodologies has been undertaken, and where there are already clear results. The group identified three methodological steps for carrying out ex post HRIAs on the impact of intellectual property rights on the right to health. The steps include:

1. Identify the issues or provisions: this could include the impact of patents, data protection and trademarks on the right to health and access to medicines; rights of indigenous peoples, traditional knowledge, access to seeds for farmers; and the impact of copyright on access to educational materials.
2. Conduct an economic modeling exercise: for example on prices of medicines, before, after 5 and 10 years of the agreement coming into force. The group also emphasized the need to look at the disaggregated impact on essential and non-essential medicines.
3. Analyse the impact on human rights: the group found that this step could account for things not considered by the economic modeling, for example, whether medicines are available, the level of domestic production, the decreased availability of generic medicines, and the reliance on exports.

For more information on results of HRIAs on intellectual property rights, please see ‘Assessment of CAFTA: The Impact of Intellectual Property Protection on the Right to Health and Related Rights in Costa Rica’ contained in Walker, op cit.

Annex 2: Seminar Background Paper

Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments

A Background Paper for the Expert Seminar on Human Rights Impact Assessments
of Trade and Investment Agreements, June 23-24, 2010 Geneva¹

[Dr James Harrison](#), Associate Professor, University of Warwick

I. Introduction

This background paper provides an overview of existing practice related to conducting human rights impact assessments (HRIAs) of trade agreements and addresses key methodological issues in conducting future assessments. It draws extensively upon [a previous paper produced for the Canadian Council for International Co-operation \(CCIC\)](#), work for the Scottish Human Rights Commission on HRIAs, as well as other work by this author.¹

It is structured in the following way:

- [Section II](#) defines what an impact assessment is
- [Section III](#) defines what an HRIA is and provides an overview of existing practice
- [Section IV](#) sets out details of previous HRIAs and ‘social’ impact assessments of trade agreements.
- [Section V](#) describes key lessons for undertaking future HRIAs of trade agreements
- [Section VI](#) sets out eight key steps that should be integral to any HRIA conducted of a trade agreement.
- [Section VII](#) reflects upon the benefits and potential dangers of undertaking HRIAs of trade agreements
- [Section VIII](#) provides some concluding thoughts

Hyperlinks in blue throughout the paper link to other sections of the document and key external texts and websites.

¹ I am very grateful to comments on an earlier draft by Thomas Braunschweig, Gauri Sreenivasan and Simon Walker.

II. What is Impact Assessment?

Impact assessment is an increasingly widely-adopted tool for evaluating the effects of policies, practices, programmes and regulatory interventions across a wide range of different fields.²

Impact assessments are now conducted by a variety of different actors including national and local governments, non-government organizations, businesses and inter-governmental organisations. The [International Association for Impact Assessment \(IAIA\)](#) promotes the practice of impact assessment and collects many resources on the issues.

Internationally there are a huge range of types of impact assessment. At its 2006 International Conference, the IAIA listed over 50 different ‘topical streams’.³ These include environmental, social and economic impact assessment, poverty and social impact analysis, health impact assessment and regulatory impact assessment.

III. What is Human Rights Impact Assessment?

HRIAs are also increasingly utilised to assess the impact of policies, programmes, projects, legislation and other interventions on human rights. Just as policymakers consider environmental, social or economic impacts by conducting impact assessments to explore those issues, HRIAs aim to make policymakers take into account the human rights impact of laws, policies, programmes etc. Before being recognised as a separate form of assessment, human rights impact assessment was considered as part of social impact assessment, but more recently a number of actors have begun to utilise it independently. HRIAs have been used to examine, *inter alia*:

- The impact of development programmes on beneficiary countries (e.g. see [NORAD handbook](#)).
- The human rights impact of multinational companies (see [Aim for Human Rights’ Guide](#) for an overview of instruments).
- The extent to which human rights non-governmental organisations (NGOs) have achieved their policy aims and objectives (e.g. see [evaluation of nine Dutch NGOs](#)).
- The human rights impact of foreign investment projects (See [Rights and Democracy studies](#))
- Health and Human Rights Impact Assessment (e.g. see [Aim for Human Rights’ Health Rights of Women Impact Assessment Instrument](#)).
- The impact of government policy and legislation on the rights of children (e.g. see [UNICEF’s Child Rights Impact Assessment in Bosnia](#)).
- Analysis of the government budgets including on health, food and education (e.g. see [FAO’s guide to right to food budget analysis](#)).

[The Human Rights Impact Resource Centre](#) provides details of many of these assessments, as well as a range of toolkits and methodological guidance on how HRIAs might be carried out.

There is no single existing blueprint for undertaking HRIAs. This type of assessment is a policy mechanism that is in its infancy. It has been undertaken for less than a decade. There is no universally accepted definition of what an HRIA is, and no generally accepted framework for how they should be carried out has been developed (in contrast with e.g. environmental impact assessment).⁴ There will also always be variation in practice depending on:

- The range of subjects assessed – both the particular issues involved (e.g. health, education, etc.) and the type of subjects analysed (a project, a policy, a piece of legislation, a budget etc.)

- The different actors involved in carrying out the assessment (governments, businesses, civil society actors)
- When the assessment takes place – before or after the policy or practice comes into force (*ex ante/ex post* assessments)
- The quality and complexity of the analysis undertaken
- The time, resources and quality of data available

An HRIA of a Trade Agreement seeks to assess how *the legal obligations of that agreement* will affect (negatively and positively) the human rights of people in the States concerned. It will therefore be very different from an HRIA that assesses the impacts of a particular project or programme of activities (e.g. a development co-operation programme, the construction of a pipeline) or those that assess the impact of an organisation (e.g. multinational companies, NGOs).

HRIsAs of trade agreements should be based on an explicit evaluation of the impact of trade law obligations on relevant, codified human rights obligations that apply to the actors (States and inter-governmental organisations) in question.⁵ The focus on international trade law obligations and their impact at the national level means that a specific methodological approach must be developed, particularly in relation to complex issues of causation (e.g. how might we demonstrate whether agricultural liberalisation commitments have caused human rights violations among semi-subsistence farmers?).

We therefore need to primarily focus on the specific experience of undertaking HRIsAs of trade agreements in order to understand what are the key characteristics of the HRIA process in that context (see next section). However we will also draw on some lessons from other HRIA processes where they are valuable.

IV. Existing Impact Assessments of Trade Agreements

There have been three major examples of HRIsAs of trade agreements that provide some potential lessons for how future HRIsAs should be carried out. In addition, there are a much greater number of impact assessments of trade agreements that conduct some form of ‘social’ impact assessment of the trade agreement in question. The approach taken by these ‘social impact assessments’ (SIAs) is also relevant, in that they cover many of the same issues that HRIsAs cover (e.g. how will the ‘health’ of the population be affected by intellectual property provisions that restrict access to generic medicines?). They do however use a very different normative framework (see [section V](#)). Details of the key assessments are set out below:

1. Human Rights Impact Assessments

- Thailand Human Rights Commission – In 2006, the Thailand National Human Rights Commission (TNHRC) produced a draft report of what was widely reported as the first HRIA of an international trade agreement. TNHRC considered the human rights implications of the free trade agreement that Thailand was negotiating with the US before the military coup in Thailand stalled those talks. The draft report covers four substantive areas – agriculture, environment, intellectual property, and services and investment – as well as the process of negotiation and the apparent lack of public participation and dissemination of information in this process. It is an *ex ante* assessment, in that it assesses the potential future impact of the Thailand-US bilateral trade agreement.
- A number of HRIsAs have been produced by FIAN (FoodFirst Information and Action Network) in collaboration with a number of other civil society organisations. They all analyse the human rights impact of trade liberalisation on the right to food of agricultural producers in a range of different

countries. These studies utilise the same basic methodological approach – they combine macro-level analysis of domestic food production, foreign importation and related state policies (of both domestic and external state actors) with micro-analysis at the community level. Human rights analysis combines the findings on the macro- and micro-level and evaluates them from the perspective of the right to food. Studies so far conducted are:

- Paasch, Garbers and Hirsch, [Trade Policies and Hunger: The Impact of Trade Liberalisation on the right to food of farming communities in Ghana, Honduras and Indonesia](#) (2007). It considers the impact of trade liberalisation due to trade conditionality in IMF structural adjustment programmes on the right to food of rice farming communities in Ghana, Honduras and Indonesia. It is an *ex post* assessment, in that it assesses past impacts of trade liberalisation in each of these countries.
- [Right to Food of Tomato and Poultry Farmers, Ghana](#) (2007). It analyses the effects of the European agricultural and trade policy and trade conditionality in IMF structural adjustment programmes on small producers of tomatoes and chicken breeders in Ghana. It is primarily an *ex post* study, but also predicts future impacts as a result of further liberalisation.
- [Right to Food of Milk and Honey Farmers, Zambia](#) (2008). It focuses upon the future potential human rights impact (*ex ante* study) of EU Economic Partnership Agreements on dairy and honey farmers in Zambia.
- [The Right to Food of Milk and Maize Farmers in Uganda](#) (2009). It investigates the past and potential future impact of agricultural trade policies of the EU on the right to food of small-holder farmers in Uganda, focussing on two products: milk and maize.
- [Simon Walker, 'Assessment of CAFTA: The Impact of Intellectual Property Protection on the Right to Health and Related Rights in Costa Rica'](#) contained in the book ['The Future of Human Rights Impact Assessments of Trade Agreements'](#) (Intersenta 2009). It considers the impact of the intellectual property provisions of the Central American Free Trade Agreement on the right to health in Costa Rica. It is an *ex ante* assessment which utilises economic modelling, causal-chain analysis and expert judgment to assess impact on the right to health. The book provides the most detailed methodological guidance on conducting HRIAs of trade agreements that has been produced.
- [Government HRIAs](#) – There are no examples of governments/inter-governmental bodies undertaking HRIAs of trade agreements (there are plenty of social ones, see below). Canada has recently implemented a new human rights reporting mechanism in its Free Trade Agreement (FTA) with Colombia which was originally described as an HRIA but appears to have few of the features that are core to the HRIA process described below.

2. Social Impact Assessments

- [EU Sustainability Impact Assessments](#) – The EU systematically conducts economic, social and environmental impact assessments of all major multilateral and bilateral trade negotiations. These are known as Sustainability Impact Assessments. Social impacts are measured separately according to social 'indicators' and impacts are assessed as of greater/lesser/no significance.
- [The United Nations Environment Programme](#) – UNEP has over thirty years of experience of conducting environmental impact assessments of trade agreements. Over the last decade it has also developed an impact assessment methodology that incorporates integrated environmental, social and economic assessment.
- [Other 'social' impact assessments of trade agreements](#) have tended to be conducted on an ad hoc basis by a range of different actors - national governments, NGOs, intergovernmental organisa-

tions or academic institutions. The greatest number of these impact assessments have been conducted in Central and South American countries. Others have been undertaken in Australasia, the Pacific region and Africa. Altogether, extensive research of existing impact assessments of trade agreements identified over 30 assessments (up until 2007) that contained some kind of social impact analysis. [A catalogue of the assessments](#) was produced for University of Nottingham Human Rights Law Centre.

V. Key lessons in undertaking future HRIAs of trade agreements

On the basis of extensive analysis of the above assessments, which has been undertaken by this author and others elsewhere,⁶ there are clear lessons to learn for conducting future HRIAs of trade agreements.

1. Added value of HRIAs over social impact assessment

There are a number of interconnected reasons for undertaking HRIAs of trade agreements as opposed to social impact assessments:⁷

- In HRIAs, the impact of trade agreements can be measured according to legal obligations entrenched in international legal instruments rather than partial and sometimes seemingly arbitrary ‘social’ principles (e.g. core EU ‘themes’ like poverty, health and education and equity).
- The human rights principles of interdependence and inter-relatedness help us to turn our minds to multiple impacts (e.g. on health, education and housing together) rather than focus on one or two predetermined impacts.
- HRIAs should put pressure on duty-bearers’ to act to protect the rights of ‘rights-holders’ and provide justifications for their policies in human rights terms.⁸
- HRIAs should engage international and national human rights actors (e.g. UN Actors, NHRIs etc.).
- HRIAs emphasise the importance of transparency, participation and empowerment, both in the process of conducting the impact assessment and in the negotiation and implementation of the trade agreement itself.⁹ (However, we need to make sure that the rhetoric is reflected in the reality).
- Many existing social impact assessments of trade agreements under-explore or marginalize the impact of trade agreements on the most vulnerable and disadvantaged persons and particular groups who might suffer (or benefit) as a result (e.g. women, ethnic minorities). A human rights-based approach to international trade “shifts the perspective from aggregate values – from the benefits of trade for the country as a whole – to the impacts of trade on the most vulnerable and ... insecure”¹⁰.

2. A technical not an ideological process

An HRIA is not suited to engagement in an ideological discussion about the purposes of, or overall justifications of the neo-liberal trade agenda. Nor is it an appropriate tool for passing judgment on whether a country *should be* eligible for a trade agreement. It should be utilised as the basis for an empirical study of the actual or potential human rights impacts of the trade agreement itself, based on the normative framework of human rights.

But a number of existing impact assessments are clearly very much ideologically opposed to the agreement being evaluated, and make strong statements about negative impacts that are not directly linked to any evidence presented. On the other hand, the EU assessments have been widely accused of taking an excessively pro-liberalisation stance. Measuring the human rights or broader social impact of any trade agreement is a complex process and must be based on some form of empirical analysis. Unsubstantiated ideological opposition/support for the agreement in question is likely to undermine its perceived objectivity and therefore value.

3. Different approaches required for assessing different types of provisions.

HRIAs may assess a number of different types of provisions of trade agreements:

- provisions of FTAs that *directly aim* at the protection and promotion of human rights, in particular provisions protecting labour rights.
- provisions of FTAs that have an *indirect human rights* impact (e.g. agricultural liberalization provisions, intellectual property provisions, investment provisions etc.).
- the process of negotiating a trade agreement and the extent to which it has promoted transparency and participation in accordance with key human rights principles.

As highlighted in [Section IV](#) and in [Appendix 1](#) there are a number of existing resources which assist in the development of future HRIA methodologies. The main focus of work so far has been on liberalisation of trade (in particular agriculture) and intellectual property provisions. There is also some limited guidance on assessing negotiating processes.¹¹ But a great deal more work is needed in order to understand how the legal standards on transparency and participation contained in key human rights instruments translate to obligations that need to be taken into account in the negotiation of trade agreements.¹²

There are no existing resources (which this author is aware of) which consider how a human rights impact assessment of investment provisions or labour standards might be undertaken. [Appendix 2](#) therefore provides a very brief outline for how an HRIA of investment provisions or labour standards might be undertaken from [a study of how an HRIA of the Canada-Colombia FTA might be conducted](#). A great deal more work will be required to develop methodological frameworks for these fields.

4. The Timing of the Assessment

HRIAs can take the form of both *ex ante* assessments (undertaken before or during the negotiation of trade agreement, or prior to implementation), and *ex post* assessments (undertaken on a trade agreement after a period of implementation). *Ex ante* assessments present more complex methodological challenges. In *ex post* assessments, it is possible to consider evidence of the actual impact of the trade agreement that is in force, and attempt to measure actual impacts on the population in question. In an *ex ante* assessment, this is not possible because the impacts have not yet happened. Therefore we need to find mechanisms for measuring *potential* impacts of the agreement.

Ideally, HRIAs should be cyclical with ongoing monitoring and review of impacts. Little evidence was found of cyclical assessments being undertaken in practice.

5. Complexity versus Simplicity

There is always a trade-off between the optimal methodology for the HRIA and a methodology that is achievable and produces a timely output. In the former we would want to e.g. develop a wide range of human rights indicators/questions, conduct a range of original case studies, specifically commission economic analysis of the FTA, conduct extensive and long term consultations with potentially affected

communities etc. In the latter scenario we may want to rely on less detailed analysis, more limited consultations and case studies and existing economic analysis so far as it is available. The problems inherent in this trade-off are found in many discussion of HRIAs.¹³ Much will depend on the time, resources, expertise available to the assessment team and they way impacts are reported.

It is also relevant to think here about the actors undertaking the assessment – do we require a more robust and constrained methodology for governments than we do for civil society HRIAs? In any event there may be benefits in having minimum standards for the conduct of HRIAs so that any single HRIA benefits from the credibility of the nomenclature.

6. Who undertakes the assessment

There are difficulties in creating robust frameworks that are able to gather reliable information about human rights impacts on particularly vulnerable and disadvantaged groups, and demonstrate whether or not these are caused by trade agreements. Some of the SIAs analysed reflected the difficulties inherent in this analysis. Those dominated by economists tended to concentrate on the economic impacts of the agreement and social impacts were often marginalised. Those without sufficient trade or economic expertise tended to under-explore the complex issues of causality and predicting future consequences inherent in a trade agreement of this type.

The creation of appropriate methodologies will require interdisciplinary teams of persons with complementary knowledge and skills including human rights and trade law and economics expertise coupled with social science expertise particularly in participatory methodologies.¹⁴ The overall structure of the assessment team will also depend on resources. Issues of independence, oversight and strict methodological frameworks are going to be particularly relevant where the HRIA is undertaken by a government. The recent experience of negotiating an ‘HRIA’ process in the Canada-Colombia FTA speaks to the difficulties that can be encountered.

VI. Key Steps in Undertaking an HRIA of a Trade Agreement

Although there is no single methodology for HRIAs, most have some key features in common. On the basis of analysis of existing HRIAs of trade agreements and impact assessments in other fields, eight key steps have been identified that should be included in any HRIA. These steps will inevitably require some adaption depending on timing, organisation, substance of assessment and resources. It is also recommended that people planning an *ex ante* HRIA look at the methodology by Simon Walker, for a much more detailed exploration of many of the same steps.¹⁵

There will in practice be some overlap between steps (in particular the consultation ‘step’ will be likely to start at the screening or scoping stage)) and some steps will not always be explicit. But each of the stages are set out individually and in turn below for ease of reference:

1. Screening
2. Scoping
3. Evidence gathering
4. Consultation/Participation
5. Analysis
6. Conclusions and Recommendations
7. Publication/Reporting
8. Monitoring and review

1. Screening

'Screening' is the process of deciding whether a particular policy is suitable for a full impact assessment, and screening out policies where an HRIA is not considered appropriate or necessary. A trade agreement contains a vast array of provisions that are potentially subject to an HRIA (e.g. trade in goods, trade in services, investment, intellectual property etc.).

Attempting to measure the *overall* human rights impact of an agreement is a monumentally complex task, particularly given the potential for long, intermediate and short term impacts. Attempts to measure overall 'social' impact across an entire trade agreement have tended to become superficial exercises. There are worries about the Canada-Colombia human rights reporting process for exactly this reason.

The screening process therefore identifies the key human rights issues that are subject to further analysis in the full assessment study. There is no recognised methodological framework for carrying out such a screening study. But some preliminary information gathering and analysis will probably be required in order to justify the screening decision – about the country itself, the trade agreement in question, and why the proposed sector/issue is worthy of a full assessment.¹⁶

Where governments are undertaking assessments, it is vitally important that there is a transparent process for deciding which elements of the trade agreement are to be subject to a full assessment. Where a civil society organisation is undertaking an HRIA of a trade agreement, they will often have a pre-determined area of interest (e.g. the impact of investment provisions). But decisions should still be justified through e.g. use of existing studies, expert analysis, causal chain analysis etc.¹⁷

2. Scoping

'Scoping' is the information that is gathered and questions that are asked once the decision to undertake a full HRIA has been made. This stage is termed 'planning' or 'mapping' in some HRIA methodologies.

In the trade context, questions will include

- What are the relevant trade measures and how do they operate? For example in relation to intellectual property and access to medicines we will need to know about e.g. patent terms, compulsory licensing arrangements etc.
- What are the human rights obligations of relevant actors (i.e. States who are parties to the agreement and relevant inter-governmental organisations)? This will include both national and international human rights obligations.
- What is the baseline situation in the country (i.e. prior to the trade agreement) with regard to the issue in question? E.g. what is the existing regime for provision of essential medicines, what are the existing patent laws etc?
- What are the potential mechanisms for dealing with any adverse impacts identified? (e.g. increased government support, tariff rises in products, human rights clauses in investment arbitration provisions etc.).
- What potential human rights impacts is the measure in question likely to introduce? This should include consideration of positive as well as negative impacts. E.g. how will/have reduced tariffs on agricultural products impact (ed) upon urban poor as well as rural farmers?
- What are the indicators or questions by which a judgment will be made about the human rights impact of the measure in question?

3. Evidence Gathering

Without gathering evidence about the (potential) impacts of a policy, the conclusions of the decision-maker are likely to reflect simply their own knowledge, experience and prejudices. This is not to say that evidence will provide us with certain knowledge about a policy's human rights impacts. '... questions of time, causation and spuriousness affect any assessment's ability to draw inferences about the true impact of a set of activities.'¹⁸ But it should give us a more informed basis on which to make our decisions.

The evidence required and the methods for collecting it will depend on the type of assessment being undertaken. For instance, in an *ex post* assessment there will be evidence of what has occurred as a result of the trade agreement coming into force, whereas in an *ex ante* assessment we will not have the same information available about future impacts. However it is still possible to predict changes based on comparable situations elsewhere and from estimating likely responses to policy changes by effected individuals.¹⁹

Whether an HRIA is *ex post* or *ex ante*, a combination of research sources will be required. Most advanced HRIA methodologies suggest a combination of quantitative and qualitative research methods:

Quantitative Research – This is the collection of numerical data about a situation. It will be primarily economic analysis of the trade agreement in question, and will be particularly important to demonstrate the overall impact of a particular trade measure (e.g. increase in rice imports entering the country as a result of liberalization). Quantitative research methods might include:

- Economic studies of the impact of existing trade policies
- Economic modeling of the potential future impact of trade policies
- Questionnaires which ask for responses that can be subjected to statistical analysis

Qualitative Research – Simply put, this is research which does not give you a hard number, but rather gives you a narrative about people's experiences. The consultation stage of the assessment can provide qualitative research but there may also be pre-existing qualitative data from earlier research. Qualitative research might include

- focus groups
- interviews with key rights-holders
- interviews with experts on the subject of the policy and on the rights issues
- case studies of particular groups and individuals
- questionnaires which ask for narrative responses
- other reports or academic articles

HRIAs of trade agreements will need to combine these two types of research (quantitative and qualitative) in order to analyse what the human rights of a policy is on particular people. This is because:

- Qualitative research can give a human face to what might otherwise be an abstract set of numbers and show how real people's lives have been or could be affected by a policy. But over-reliance on qualitative research faces the accusation of being subjective and partial (it depends on who is in the room).
- Quantitative data can show how many people actually experience certain outcomes and how great the impact is. Quantitative data can also be disaggregated (by for example race or gender) more reliably because of the potentially larger numbers in the data set. This can help expose differential impact of a policy on particular groups. But over reliance on quantitative methods can marginalise consultation and also leads to 'the erroneous impression of precision and confidence in predic-

tions'.²⁰ It may also disguise impacts on particular people in a particular place where the figures are not sufficiently precise (e.g. a national survey will not give you accurate figures for a particular community).

Decisions on appropriate methodologies will depend on the nature of the trade provisions being analysed (e.g. investment/labour provisions). Existing assessments have utilised various forms of economic analysis, causal chain analysis, expert study and analysis, participatory case studies, questionnaires, focus groups, interviews and observations.

Many SIAs tend to concentrate on detailed economic analysis with little attempt at the more complex social/human rights analysis. Studies and analysis of the EU SIAs and the South American impact assessments in particular, have been critical of their methodologies.²¹ Most have utilised traditional economic models to assess social impacts and this has been found to have its limitations. There is often insufficient data to do economic 'modelling studies' to predict future outcomes with respect to social impact, and effects are so complex that it is difficult to predict outcomes with any certainty.

Consideration of a diverse range of mechanisms for measuring impacts is therefore required. Those impact assessments that have been most successful in terms of identifying severe social impacts on specific people have tended to employ case studies of affected populations (e.g. FIAN studies, certain EU studies). Outside the field of trade, one of the most advanced mixed quantitative/qualitative methodologies for conducting an *ex ante* HRIA is UNICEF's [Child Rights Impact Assessment of Potential Electricity Rises in Bosnia and Herzegovina](#).

But it must be remembered that even an optimised impact assessment methodology will fall short of hard science where definitive answers can be provided based on incontrovertible 'evidence'. In particular, there are two inherent problems of impact assessments more generally: attribution gaps due to the problems of proving cause and effect in a complex chain of activities and – in the case of *ex-ante* assessments – the hard-to-predict future consequences of provisions that have not yet been implemented.

4. Consultation and Participation

By consultation we mean the provision and seeking of advice and information, in relation to the HRIA, whereas by participation we mean that people actually playing an active part in generating ideas as well as the decision-making process. I was unable to find any existing standards for what constitutes minimum reasonable standards of consultation and participation in an HRIA. I only found examples of better and worse practice.

So, the Paasch, Garbers and Hirsch Study utilized extensive interviews with affected populations in order to ascertain if price fluctuations in rice as a result of imports had led to human rights violations on the ground. Interviews were conducted with affected individuals and groups and the results were the basis of much of the human rights analysis in the final report. Participatory methodologies of other assessments have been more widely criticised. NGOs and other commentators have been very critical of the participatory mechanisms utilised in many of the EU SIAs of trade agreements; the way relevant actors, particularly in third countries, are informed about the SIA, consulted as to their views, and those views taken into account in the ongoing conduct of the SIA.

The majority of guidance on consultation processes simply stresses the importance of consultation and participation from a human rights perspective and argues that HRIAs should include effective consultation with the full range of potential rights-holders.²² The empowerment aspect of consultation is also stressed – that the process of bringing together (potentially) affected persons is itself a valuable end in itself.²³ But beyond this, a great deal more work needs to be done to develop guidance and good practice principles that are relevant to people conducting HRIAs of trade agreements in particular contexts. Do we want minimum standards about what is appropriate? To what extent should these standards

recognize that the degree of consultation and participation that is possible will depend on the time and resources that are available to the HRIA?

5. Analysis

This is the stage of the process where a decision is taken over what the human rights impact is. HRIAs must be based on an explicit evaluation of the impact of trade law obligations on relevant, codified human rights obligations that apply to the State in question. Otherwise there is a danger that human rights become merely ‘window-dressing’ for the assessment. Relevant obligations should have been utilised throughout the assessment to shape evidence gathering and consultation. Now they will be utilised to analyse what the human rights impact is.

But it is often difficult to translate the human rights obligations contained in international and national laws into analytical tools that can be utilised to measure impacts of trade agreements. Guidance from expert bodies, such as the General Comments of the Committee on Economic Social and Cultural Rights, should be utilised to ‘flesh out’ the content of obligations.

Beyond this, most HRIA toolkits and methodological frameworks talk of developing a series of ‘indicators’ which should then be developed to measure the impact. There has been much work internationally to put together indicators which can be utilised to determine whether a right has been violated. However, despite much talk about using these indicators in impact assessment, there is little evidence of their active use in existing assessments.

This may be because work on indicators is all relatively recent and only in relation to certain rights.²⁴ But it is also because importing lists of indicators of particular rights wholesale into an impact assessment process is likely to be overwhelming for decision-makers and also lack the contextual specificity necessary for this kind of exercise.²⁵ In HRIAs that do use indicators as tools of analysis, smaller lists of very context-specific questions are generally created. The questions are used in order to test the particular human rights issues which are the subject of the assessment.²⁶ Careful thought is therefore required to assess the extent to which indicators are utilized in future HRIAs.

An important part of this analysis stage will also be to test the hypothesis that trade agreements have caused/will cause problems or benefits from a human rights perspective against other possible causes.²⁷ Where there is strong evidence of human rights violations/improvements occurring, a number of alternative causes may be still possible for their occurrence, (e.g. domestic government policies and practices) and these need to be explored in any HRIA. Conclusions may also point to the interaction of various elements leading to violations/benefits.

6. Conclusions and Recommendation

The formulation of policy-orientated conclusions and recommendations is central to conducting an HRIA.²⁸ Many of the SIAs/HRIAs analysed included no detailed recommendations for the action required to deal with any negative impacts. Other SIAs (in particular EU SIAs) focused almost exclusively upon ‘mitigation’ measures (i.e. dealing with negative impacts after the relevant agreement came into force), rather than amendments to the relevant agreement to prevent negative impacts, or recommendations that the agreement should not come into force as currently constituted. Other recommendations were insufficiently precise or did not state who needed to take action in order to ensure that the change occurred.

There are four types of conclusions that can be reached:

1. Positive or at least no negative impact found

2. Change the trade measure in question (e.g. bring in safeguard measures, exception clauses, phase-in periods etc.)
3. Bring in additional measures to mitigate the impact (e.g. funds to assist in transition to other types of production, retraining of workers, increase tariffs etc.)
4. Negative impact found, but no action taken²⁹
5. Abandon the measures in question or the whole agreement.³⁰

The HRIA needs to specify the actors required to take action in relation to each recommendation.

7. Publication/Reporting

A report should be produced cataloguing the HRIA process. Publishing that report is vital to the impact assessment process. It ensures that the body responsible can be held to account by rights-holders and other interested actors. Impact assessments should provide a transparent audit trail ‘for others who want to question the methods or results or redo the analysis with different assumptions’.³¹

8. Monitoring and Review

A human rights impact assessment should not be a one-off policy but an ongoing and dynamic process.³² This means that at the end of any assessment process a procedure should be put in place for how and when impacts should be assessed again in the future.

The HRIA team should identify a monitoring and review process to make sure that:

- Recommendations are implemented.
- Impacts of the policy are reviewed over time to see whether predicted impacts have occurred or other unexpected impacts have arisen.
- Indicators are developed to measure future impacts.

VII. Benefits and Potential Dangers of Undertaking HRIAs

Having set out the methodological guidance above, it is important to take a step back and think about what HRIAs can achieve in practice. There are both benefits and potential dangers of conducting HRIAs of trade agreements. These should be considered in making a determination of whether an HRIA should be carried out in any particular context.³³ Some of the advantages of HRIAs of trade agreements, as opposed to social impact assessments have been discussed above including the power and universality of the legal obligations of human rights, its empowerment function, the engagement of human rights actors and the human rights focus on the most vulnerable and disadvantaged.

In addition we might add that HRIAs have the potential to enhance the engagement of human rights discourse in the trade sphere. It is an important critique of existing human rights approaches to international trade law that at the stage of actual policy formulation and evaluation ‘human rights language recedes into the background’ and that policy proposals often do not seem ‘to be derived from human rights obligations in any direct way’.³⁴ HRIAs allow human rights to be utilized to critique specific trade measures and formulate concrete alternatives.

HRIAs also enables human rights to be ‘mainstreamed’ within policymaking.³⁵ This has the potential to affect both institutional cultures and individual decision-making more widely in organisations. Particularly where HRIAs are conducted by governments, there is the potential for real change to be im-

plemented and for the attitudes of policymakers themselves to be changed so that they start to take into account human rights issues regularly in their decision-making processes.

But there are also potential dangers and disadvantages of conducting HRIAs:

- Proper human rights impact assessment, particularly in the trade context, is a complex process. For example, there is a danger that impact assessment will concentrate on short term impacts that are easily quantifiable rather than long term effects or impacts that are not easily anticipated.³⁶ HRIAs (like all forms of impact assessment) therefore need to make sure that they do not perpetrate a ‘dumbing down’ process on human rights fulfilment and on policy-making generally.
- There is a danger that the legal obligations of human rights can be seen in a vacuum. Therefore consideration of the broader social and environmental impacts of policies may be marginalised or overlooked entirely. The focus of the human rights approach upon ‘violations’ may also lead to assessments disregarding or marginalizing positive impacts (This may be an argument in favour of integrated assessments or at the very least a need to build in structured consideration of positive impacts).
- Particularly where HRIAs are conducted by governments, they can become simply a bureaucratic process that ‘may come to value technique over substance’. Even activists and campaigners can lose touch with the underlying values that make the human rights critique important.
- Decision-makers (who will often be trade specialists) can co-opt the HRIA process and then utilize it to justify decisions, safer in the knowledge that they have ‘taken into account’ legitimising human rights values.³⁷
- HRIAs can become a mechanism for stopping further debate on an issue (‘we have already considered the human rights implications of this when carrying out the impact assessment, there is no need to consider the human rights issues further/in the future’).³⁸

VIII. Concluding Thoughts

A decision to undertake an HRIA is in the end a political decision concerning the purchase it is likely to have in challenging orthodoxies and creating fairer models of trade that make peoples’ lives get better.

An HRIA is highly unlikely to ever be able to provide entirely ‘objective’ and undeniable ‘truths’ about the impacts of an FTA. Both the methodology and conclusions are likely to be highly contested by those who doubt the relevance of human rights to trade debates.

But HRIAs can ensure that key actors at the national and international level confront a range of concrete issues that would not normally be part of the mainstream trade agenda, such as the degree of impact of trade obligations on poor producers in terms of their access to food, land, livelihood, education, healthcare and housing etc.

For HRIAs of trade agreements to maximise their effectiveness, they need to engage those audiences beyond the human rights community who have power with regard to trade policy. This is why they need to demonstrate

- A lack of pre-existing bias about what the impact of a trade agreement will be
- Coherent methodological frameworks
- Persuasive analysis
- Clear and directed recommendations

The history of human rights impact assessment up to this point in time has been of calls for HRIAs to be undertaken and pioneers undertaking them. It is now time to ‘professionalise’ and to develop a set of principles for conducting HRIAs so that their effectiveness can be maximised and methodologies cannot be undermined by actors seeking legitimacy simply by utilising the term ‘human rights impact assessment’.

Appendix 1 – Key Resources

Human Rights Impact Assessments

FIAN et al studies available at - <http://www.fian.org/programs-and-campaigns/projects/agricultural-trade-and-the-right-to-food>

Simon Walker, ‘Assessment of CAFTA: The Impact of Intellectual Property Protection on the Right to Health and Related Rights in Costa Rica’, in ‘the Future of Human Rights Impact Assessments of Trade Agreements’ (Intersentia, 2009).

Thailand National Human Rights Commission (Subcommittees), Draft Report on Results of Examination of Human Rights Violations (2006), electronic copy on file with this author

Useful Websites

Human Rights Impact Resource Centre - <http://www.humanrightsimpact.org/> - containing HRIAs in a range of different fields and extensive methodological guidance

The University of Nottingham Human Rights Law Centre Trade Impact Assessment database - http://www.nottingham.ac.uk/law/hrlc/business-trade/Final_Database.xls - containing a wide range of ‘social’ impact assessments of trade agreements

Exploring HRIA Methodological Issues

3D, ‘Human rights impact assessments: A pertinent tool for informing and improving trade governance?’ http://www.3dthree.org/pdf_3D/3D_WTOPF2009_panelHRIAsummary.pdf

3D, Insights on Human Rights Impact Assessments of Trade Policies and Agreements, http://www.3dthree.org/pdf_3D/HRIAsbackgroundinformation.pdf

Olivier De Schutter, ‘A Human Rights Approach to Trade and Investment Policies’ in Murphy and Pasch (eds.) [The Global Food Challenge: Towards a Human Rights Approach to Global Food Policies](#) (2009) 14-29

James Harrison, Alessa Goller ‘Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?’ (2008) *Human Rights Law Review* 8 (4)

James Harrison – Conducting A Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement: Key Issues.’, (2009) 1 - 17, A Background Paper for the CCIC Americas Policy Group available at http://www.ccic.ca/files/en/what_we_do/003_apg_2009-02_hr_assess_of_cfta.pdf.

Armin Paasch ‘World Agricultural Trade and Human Rights – Case studies on violations of the right to food of small farmers’ in Murphy and Pasch (eds.) [The Global Food Challenge: Towards a Human Rights Approach to Global Food Policies](#) (2009) 40-50

Simon Walker, 'The Future of Human Rights Impact Assessments of Trade Agreements' (Intersentia, 2009).

On the Development of Indicators

Office of the High Commissioner for Human Rights, OHCHR, *Report on Indicators for Promoting and Monitoring Implementation of Human Rights* (6 June 2008) HRMI/MC/2008/3.

Office of the High Commissioner for Human Rights, OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments* (11 May 2006) HRI/MC/2006/7

Appendix 2 – Illustrations of the Process for Undertaking HRIAs

Please note that these are brief illustrations only, and that they were developed in the context of a report on the Canada Colombia FTA,³⁹ before further work had been done on the methodological framework set out above.

A) Provisions providing protections for foreign investors

This type of assessment is very different from previous HRIAs of trade agreements which have focused on trade in goods, services and intellectual property protection. There are a number of different types of assessment which could be undertaken with regard to investment provisions. One could, for instance, analyse the extent to which any 'stabilisation clauses' in the agreement might lead to governments not bringing in legislative or other policy instruments to protect human rights which they otherwise would. The propensity for stabilization clauses to lead to such regulatory chill is a major concern.⁴⁰ Conducting an impact assessment of such clauses would be very difficult, particularly in respect of the extremely complex causation issues. It will be difficult (although not impossible) to find compelling evidence that a particular stabilization clause has been the primary cause of failure to legislate to better protect human rights, given the number of possible alternative (and perhaps even overlapping) domestic causes for such failures.

Perhaps the clearest issue for analysis by an HRIA is the extent to which provisions in the FTA which protect foreign investors, (and in particular the ability of MNCs to invoke international investment arbitration procedures) might lead to increased investment by foreign firms who might then commit or be complicit in human rights violations. This type of assessment would require at least the following key methodological steps (others are left out because of the lack of detail in the scenario):

1. Map the 'baseline' human rights situation including relevant human rights law (national and international) and the identification of key communities and other groups whose human rights are most likely to be endangered by the provisions in question (e.g. workers in the extractive industries and communities otherwise directly impacted upon by extraction activities)
2. Develop an understanding of the investor protection provisions in the FTA, and how it compares and contrasts with other investor protection provisions which are already in place with other countries (e.g. under NAFTA).
3. Make an assessment of the (predicted) increases in investment as a result of those provisions (through e.g. case studies of countries which have already implemented similar provisions in other trade agreements, modelling studies etc.), with a particular focus on areas of investment where human rights violations are more likely (e.g. in mining and extractive sectors). NB: The relationship between investment agreements and increases in levels of investment is very difficult to as-

certain. Since writing this outline initially concerns have been raised about the validity of this stage of the process.

4. Use indicators to measure whether increased human rights violations have occurred/will occur post-investment agreement and the extent of such human rights violations
5. Analyse the type and extent of human rights violations committed by investors already operating in the country in those industries and/or investors operating in other comparable countries.
6. Consult with local communities and other key actors in order to ascertain particular communities where violations have occurred and the nature and extent of those violations, measured against the indicators developed. This stage could utilise HRIAs already undertaken of investment projects undertaken with regard to Canadian firms.⁴¹
7. Analyse how investor protections might lead/have led to increased activity by companies responsible for/complicit in human rights violations and conclude on the (predicted) volume and nature of those violations
8. Make recommendations, as necessary, with regard to how investor provisions need to be amended/rejected in order to prevent human rights violations being caused by the agreement or other measures which are needed.
9. Make recommendations on the nature of the monitoring which is required, post-implementation in order to assess any human rights violations which occur in the future.

B) Provisions protecting labour rights

As with any other set of provisions in the FTA, provisions protecting labour rights can be assessed separately, and conclusions reached on their impact. Such an assessment will be attempting to gauge the extent to which provisions in the agreement (or in any side accord) effectively protect the rights of workers, and/or will lead to a decrease in the violation of labour rights. They will therefore be concentrating primarily on the degree of *positive* and *intentional* impact such additional labour regulation might produce, as opposed to the potential *negative* and *unintentional* impact of e.g. investment provisions. Therefore, it will be important to make sure that, to the extent that such provisions are found to have a positive impact, this does not lead to an endorsement, from the human rights perspective, of the FTA as a whole.

In terms of the methodological approach of any assessment undertaken, this should include the following key steps:

1. Map the 'baseline' human rights situation including relevant human rights law and the identification of the type of labour rights violations which are currently prevalent and workers most likely to suffer from those types of violations
2. Identify the type of labour provisions set out in the Agreement/Side Accord and their method of enforcement/promotion
3. Consult with key stakeholders (workers, union representatives, government officials etc.) regarding the perceptions of the likely impact of the labour provisions.
4. In the case of an *ex ante* HRIA, identify other countries with comparable labour issues to those faced and with similar labour provisions in trade agreements already in force.
5. Assess the effectiveness of the Side Accord in enhancing labour rights protection in identified countries. This will include quantitative analysis of the numbers of labour rights violations pre- and post- Agreement, qualitative analysis of the perceived impact of the Accord in changing prac-

tices through interviews with e.g. government officials, union officials, workers in key industries etc in those countries.

6. Take into account alternative causal explanations for increase/decrease in labour protection in identified countries (e.g. increased national protection of labour rights unrelated to the trade agreement in question etc.)
7. Assess the (likely) impact of these provision in light of the above analysis and, to the extent considered appropriate, make recommendations with regard to amendment/rejection of the provisions in question and/or alternative forms of labour protection.
8. Make recommendations on the nature of the monitoring which is required, post-implementation in order to assess the impact of the provisions as enacted.

Notes

¹ See James Harrison, 'Conducting a Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement: Key Issues.' (2009) A Background Paper for the CCIC Americas Policy Group available at http://www.ccic.ca/files/en/what_we_do/003_apg_2009-02_hr_assess_of_cfta.pdf. See also James Harrison & Alessa Goller, 'Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?' (2008) Human Rights Law Review, 8(4), 587-615. James Harrison 'Trade Agreements, Intellectual Property and Access to Essential Medicines: What Future Role for the Right to Health?' (October 23, 2009). GLOBAL GOVERNANCE OF HIV/AIDS, Aginam & Harrington, eds., Edward Elgar (2010), Warwick School of Law Research. Available at SSRN: <http://ssrn.com/abstract=1493309>.

² See the International Association for Impact Assessment at <http://www.iaia.org/modx/>.

³ Paul Hunt & Gillian MacNaughton, 'Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health', (UNESCO, 31 May 2006) available at: http://www.who.int/hhr/Series_6_Impact%20Assessments_Hunt_MacNaughton1.pdf, p. 9.

⁴ Gauthier De Beco, 'Human Rights Impact Assessments' (2009) Netherlands Quarterly of Human Rights, 27(2), 139-166, p. 140.

⁵ Emphasising the importance of basing HRIA on explicit human rights obligations see 3D, 'Insights on Human Rights Impact Assessments on Trade Policies and Agreements' at http://www.3dthree.org/pdf_3D/HRIAsbackgroundinformation.pdf.

⁶ Relevant works by other authors are referred to throughout. See also Harrison & Goller 'Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?' (2008) Human Rights Law Review, 8(4), 587-615. Harrison 'Trade Agreements, Intellectual Property and Access to Essential Medicines: What Future Role for the Right to Health?' (October 23, 2009). GLOBAL GOVERNANCE OF HIV/AIDS, Aginam & Harrington, eds., Edward Elgar (2010), Warwick School of Law Research. Available at SSRN: <http://ssrn.com/abstract=1493309>.

⁷ For more detailed consideration see Simon Walker, 'The Future of Human Rights Impact Assessments of Trade Agreements' (Intersentia, 2009), 39-49; Armin Paasch, 'World Agricultural Trade and Human Rights – Case studies on violations of the right to food of small farmers' in Sophia Murphy & Armin Paasch (eds.) [The Global Food Challenge: Towards a Human Rights Approach to Global Food Policies](#) (2009) 40-50, p. 48; FIDH (2008) 'Position Paper. Human Rights Impact Assessment of Trade and Investment Agreements concluded by the European Union.' Brussels. www.fidh.org/IMG/pdf/positionpaperFIDH-HRIA_finalfevrier2008.pdf, p. 12.

⁸ De Beco, 2009, above n. 4, p. 147, Hunt & MacNaughton, 2006, above n. 3, p. 15.

⁹ Hunt & MacNaughton, 2006, above n. 3, p. 15; De Beco, 2009, above n. 4, p. 166.

¹⁰ Olivier de Schutter, 'Mission to the World Trade Organization, Report presented to the Human Rights Council' (A/HRC/10/5/Add.2), 4 February 2009. http://ap.ohchr.org/documents/dpage_e.aspx?m=101, p. 5.

¹¹ The Thailand HRIA is an impact assessment that makes limited efforts to develop such a methodological approach.

¹² E.g. Article 25 of the International Covenant on Civil and Political Rights states that “Every citizen shall have the right and the opportunity ... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;” But the case has not as yet been convincingly made, to my knowledge, that this extends to an obligation to be consulted in the negotiation of a treaty with a foreign state, and, more importantly what form that consultation that should take in order to be effective.

¹³ Compare Todd Landman, 'Studying Human Rights' (2006), p. 139, “Maximising the rigour of a human rights impact assessment can only help to strengthen the types of inferences that are drawn and add weight to the types of human rights arguments that are made. The underlying logic of impact assessment is straightforward but is vulnerable to a number of methodological challenges that if not adequately addressed may lead to insecure inferences about impact, and ultimately undermine the kinds of human rights arguments that we make.” With the Humanist Committee on Human Rights, 'Human Rights Impact Assessment in Practice, Conference Report' (2007) p. 37-40, “... there is an inevitable tendency to be precise, complete and almost academic in developing (and using) particular instruments and tools. This can be disadvantageous for the actual use and effectiveness of the tool ... Instruments need to be as simple and easy to use as possible. This helps to 'sell' the concept to potential users: NGOs, governments and business. It also keeps the process manageable”.

¹⁴ Olivier De Schutter, 'A Human Rights Approach to Trade and Investment Policies' in Sophia Murphy and Armin Paasch (eds.) [The Global Food Challenge: Towards a Human Rights Approach to Global Food Policies](#) (2009) 14-29, p. 26 discussing the importance of wide participation.

¹⁵ Simon Walker, 'The Future of Human Rights Impact Assessments of Trade Agreements' (Intersentia, 2009), 51-121.

¹⁶ See Walker, above n. 15, p. 93 for a number of criteria by which to judge the potential significance of human rights impact.

¹⁷ E.g. see FIAN, 'Empowering Civil Society to Monitor the Right to Food. A Case Study Report on Uganda' (2009) p. 10.

¹⁸ Landman, 2006, above n. 13, p. 130.

¹⁹ E.g. see FIAN studies and the UNICEF Bosnia Study by Alvin Birdi et al., 'Child Rights Impact Assessment of Potential Electricity Price Rises in Bosnia and Herzegovina' (2007). http://www.unicef.org/ceecis/media_8645.html.

²⁰ Brian L. Cole & Jonathan E. Fielding, 'Health Impact Assessment: A Tool to Help Policy Makers Understand Health Beyond Healthcare' (2007) *Annual Review of Public Health*, 28, 393-412, p. 400; Saskia Bakker et al, 'Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)' (2009) *Journal of Human Rights Practice*, 1(3), 436-458 at p. 451-2.

²¹ Hernán Blanco, 'Sustainability impact assessment of trade policy and its application in the context of Latin America' (2006) *Impact Assessment and Project Appraisal*, 24(4), 285-297 at p. 292. Norman Lee & Colin Kirkpatrick, 'A Pilot Study of the Quality of European Commission Extended Impact Assessments' (2004) *Impact Assessment Research Centre Working Paper 8*, October 2004. This research concerns not only Trade SIAs, but a wide range of EU SIAs in different fields. Statement of Civil Society Organisations, *EU Trade Sustainability Impact Assessments: A Critical Review* (October 2006) at p. 6. Sarah Richardson, 'A “Critique” of the EC’s WTO Sustainability Impact Assessment Study and Recommendations for Phase III', paper commissioned by Oxfam GB, WWF-European Policy Office, Save the Children, ActionAid (2000) at p. 3.

²² De Beco, 2009, above n. 4, p. 164 – Participation in public affairs is itself a human rights (ICCPR Art. 25). Various human rights bodies have interpreted a right to participation in particular contexts as integral to particular rights. For instance in CESCR's General Comment No.14 public participation in health-related decisions is regarded as an essential component of the right to health. In the *Ilmari Lansma v Finland* case the Human Rights Committee found that minorities had the right to be consulted on policies that had an impact on their traditional way of life. In *Hatton and others v UK*, the court took into account the degree to which affected individuals had the opportunity to give their opinion on a policy. John Ruggie 'Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework' (2010) at http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf, p. 17 – Human Rights Impact

Assessment has consultation and dialogue with affected persons at the heart of its methodology because it involves rights holders rather than merely stakeholders.

²³ John Ruggie 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' U.N. Doc. A/HRC/4/035 (9 February 2007), p. 5 – the process of bringing together communities, government and business representatives is as important as the result.

²⁴ Bakker et al, 2009, above n. 20, p. 440 – “As the formulation of human rights indicators is a recent development and limited to some rights only, most existing HRIA tools have been developed without such agreed indicators and instead have their own ways to measure impacts.”

²⁵ Humanist Committee on Human Rights, 'Human Rights Impact Assessment in Practice, Conference Report' (2007), p. 37, “... the length of lists of indicators is an important issue to deal with. Long lists of indicators and elaborate checklists make the process of impact assessment unattractive and costly. At the same time the use of lists of indicators and checklists is intrinsically linked to the whole process of impact assessment and keeps it manageable. In sum there needs to be a way to develop key indicators that are strategic and make a difference to stakeholders.”

²⁶ See e.g. questions in FIAN Uganda study, above n. 17, p. 10; Walker, above n. 15, p. 171f.

²⁷ See Armin Paasch 'World Agricultural Trade and Human Rights – Case studies on violations of the right to food of small farmers' in Sophia Murphy and Armin Paasch (eds.) [The Global Food Challenge: Towards a Human Rights Approach to Global Food Policies](#) (2009) 40-50 at p. 43 for much more on causal links.

²⁸ Emphasising the importance of strong recommendations and conclusions see 3D, 'Insights on Human Rights Impact Assessments on Trade Policies and Agreements' at http://www.3dthree.org/pdf_3D/HRIAsbackgroundinformation.pdf

²⁹ This is only likely to be an issue where governments are undertaking HRIAs. It might be considered that this is never an appropriate recommendation. But a number of HRIAs were found in other fields where negative impacts were found, no action was taken and no explanation was given. At least where actors are forced to explain why no action has been taken, decisions can be scrutinised.

³⁰ For more detailed possible recommendations see Walker, above n. 15, p. 99.

³¹ Cole and Fielding, 2007, above n. 20, p. 397.

³² Ruggie, 2010, above n. 23, p. 17.

³³ For different issues and more detailed analysis see Walker, above n. 15, p. 187.

³⁴ Andrew Lang, 'Re-thinking Trade and Human Rights' (2007) *Tulane Journal of International and Comparative Law*, 15(2), 335-414 at p. 393-394.

³⁵ De Beco, 2009, above n. 4, p. 146. See also Koskenniemi, 'The Politics of International Law 20 Years Later' (2009) *European Journal of International Law*, 20(1), 7-19, p. 14.

³⁶ Cole and Fielding, 2007, above n. 20, p. 400; Jan Knippers Black, 'The Politics of Human Rights Protection: Moving Intervention Upstream With Impact Assessment' (2009), p. 238.

³⁷ Knippers Black, 2009, above n. 36, p. 238.

³⁸ Knippers Black, 2009, above n. 36, p. 238.

³⁹ See James Harrison, 'Conducting A Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement: Key Issues.' (2009), A Background Paper for the CCIC Americas Policy Group available at http://www.ccic.ca/files/en/what_we_do/003_apg_2009-02_hr_assess_of_cfta.pdf.

⁴⁰ See e.g. Andrea Shemberg, 'Stabilisation Clauses and Human Rights' (11 March 2008) <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>.

⁴¹ E.g. Rights and Democracy, 'Human Rights Impacts for Foreign Investment Projects: Learning from community experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru' (2007), *Investing in Human Rights: Volume 1 (Rights and Democracy: Montreal)*.

Annex 3: Seminar Agenda



Expert Seminar on Human Rights Impact Assessments for Trade and Investment Agreements June 23-24, 2010

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1209 Genève
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DAY 1	WEDNESDAY, JUNE 23, 2010	
08:30-09:00	Registration	
	Moderator	<i>Armin Paasch, Misereor</i>
09:00-09:15	Welcome and Introductions	<i>Gauri Sreenivasan, Canadian Council for International Co-operation</i>
09:15-10:00	Setting the Stage - the rising relevance and importance of HRIAs for trade and investment agreements	<i>Olivier de Schutter, UN Special Rapporteur on the Right to Food (20 min)</i>
	Response Panel – key strategic issues	<i>Martin Khor, South Centre Bernard Kuiten, WTO Gigi Francisco, Development Alternatives with Women for a New Era (25 min)</i>
10:00-10:30	Roundtable Discussion	
10:30-11:00	Coffee Break	

	Moderator	<i>Carole Samdup</i> , Rights & Democracy
11:00-11:45	Overview of Impact Assessments - lessons learned	
	<i>Overview of main lessons from previous HRIAs including EU-SIAs - achievements, shortcomings and challenges</i>	<i>James Harrison</i> , University of Warwick (30 min)
	<i>Political lessons from environmental impact assessment processes</i>	<i>Marcos Orellana Cruz</i> , CIEL-Washington (15 min)
11:45-12:30	Plenary Discussion on Learnings re HRIAs	
12:30-13:30	Lunch Break	
	Moderator	<i>Rolf Künnemann</i> , FIAN
13:30-14:00	Standards and Indicators for Select Human Rights - an overview	<i>Rajeev Malhotra</i> , UN OHCHR Consultant (15 min)
	Brief Q&A	
14:00-16:30	Parallel WORKING GROUPS for trade and investment related indicators and standards on selected human rights	
	<i>Right to Food</i>	Facilitator: <i>Sally Anne Way</i> , CESR: Resource People: <i>Olivier de Schutter</i> , SR <i>Louiza Kabiru</i> , Kenya Human Rights Commission
	<i>Right to Work/ Livelihood</i>	Facilitator: <i>Esther Busser</i> , ITUC Resource People: <i>Ben Moxham</i> , TUC <i>Guillermo Correa Montoya</i> , Escuela Nacional Sindical, Colombia
	<i>Right to Health</i>	Facilitator: <i>Thomas Braunschweig</i> , Berne Declaration Resource People: <i>Kajal Bhardwaj</i> , Lawyer, India <i>Stephen Marks</i> , Harvard School of Public Health

	Right to Water	Facilitator: <i>Simon Walker</i> , Human Rights expert Resource People: <i>Gustavo Maurino</i> , Association civil por la igualdad y la justicia, Argentina <i>Michael Windfuhr</i> , Brot für die Welt
16:30-17:00	Coffee Break	
17:00-17:30	Brief Report Back from Workshops	Working Group Rapporteurs
17:30-17:45	Setting Stage for Day 2, and Close	
DAY 2 THURSDAY, JUNE 24, 2010		
	Moderator	<i>Priscilla Claeys</i> , Office of the SR on Right to Food
09:00-09:30	HRIA Methodology for Trade Provisions - an overview	<i>Simon Walker</i> , Human Rights expert
09:30-12:00	Parallel WORKING GROUPS for methodologies to address key provisions of Agreements	
	Agricultural trade	Facilitator: <i>Rolf Künnemann</i> , FIAN Resource People: <i>Armin Paasch</i> , Misereor <i>Areli Sandoval</i> , Equipo Pueblo/Social Watch
	Intellectual Property Rights	Facilitator: <i>Katia Aeby</i> , 3D Resource People: <i>Simon Walker</i> , Human Rights expert
	Investment chapters/ treaties	Facilitator: <i>Gauri Sreenivasan</i> , CCIC Resource People: <i>Nathalie Bernasconi</i> , IISD <i>Angela Andews</i> , Legal Resources Centre, South Africa
	Negotiation process of trade/investment agreements	Facilitator: <i>Aileen Kwa</i> , South Centre Resource People: <i>Louiza Kabiru</i> , Kenya Human Rights Commission
12:00-13:00	Lunch Break	

	Moderator	<i>Thomas Braunschweig</i> , Berne Declaration
13:00-13:45	Reports and discussion of workshop results	Working Group Rapporteurs
13:45-14:30	Institutional Options - undertaking HRIAs as part of State obligations	
	<i>Panel discussants on various options</i>	
	Role for National Human Rights Commissions/National Ministries	<i>Jacques-chai Chomthongdi</i> , National Human Rights Commission of Thailand
	Role of Parliament, challenges	<i>Gauri Sreenivasan</i> , CCIC
	What role for UN structures?	<i>John Foster</i> , University of Regina and Carleton University
	CSO roles, particularly in Southern contexts	<i>Areli Sandoval</i> , Equipo Pueblo/Social Watch
14:30-15:15	Discussion	
15:15-15:45	Coffee Break	
	Moderator	<i>Gauri Sreenivasan</i> , CCIC
15:45-17:00	Conclusions/Next Steps	
	<i>Interview Panel</i>	<i>Olivier de Schutter</i> , SR <i>Esther Busser</i> , ITUC <i>Kajal Bhardwaj</i> , Lawyer, India (30 min)
	Do you see emerging consensus on HRIA methodologies/key benchmarks? Are there divergences in approaches?	
	What do you see as key messages of this seminar?	
	What are key issues for next steps?	
	Discussion - flipchart key issues and follow up required	(45 min)
17:00-17:45	Evaluation Process	
17:45-18:00	Close and Thank you	

Annex 4: List of Participants

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